United States Court of Appeals

for the Second Circuit

APPENDIX

76-2032

To be argued by
DAVID J. GOTTLIEB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RICHARD DAVID,

Appellant,

-against-

Docket No. 76-2032

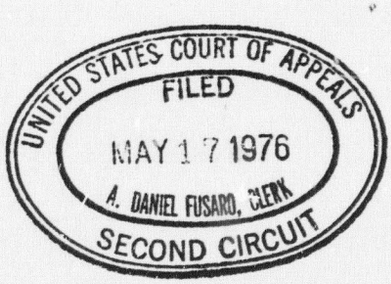
J. W. PATTERSON, Superintendent, Eastern New York Correctional Facility,

Appellee.

B
P/S

APPENDIX FOR APPELLANT
RICHARD DAVID

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.
THE LEGAL AID SOCIETY,
Attorney for Appellant
RICHARD DAVID
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

DAVID J. GOTTLIEB

Of Counsel

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CIVIL DOCKET

UNITED STATES DISTRICT COURT

JUDGE WYATT

Jury demand date:

75 CIV. 3761

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
208-1 75 3761 08-01-75 3 530 1	75 376
U.S.A. ex rel., RICHARD DAVID	For plaintiff:
-V-	Richard David N-12929 Box 338 Napanoch, N.Y. 12458
J.W. PATTERSON, Supt. Eastern N.Y. Correctional Facility	
	For defendant:
	Louis J. Lefkowitz Attorney General- State of Two World Trade Center N.Y., N.Y. 10047

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.
J.S. 5 mailed X	Clerk		AUG 1 1975		
J.S. 6 mailed 11-16-75	Marshal				
Basis of Action: WRIT OF HABEAS CORPUS 28 USC 2241	Docket fee				
	Witness fees				
Action arose at:	Depositions				

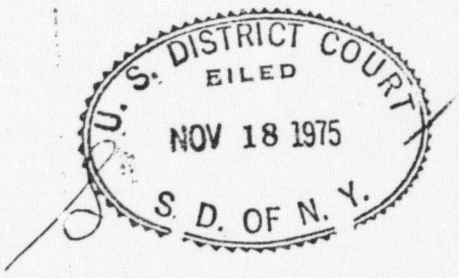
75-3761 U.S.A. ex rel., Richard David -V- J.W. Patterson, Supt. Eastern NY. 7

DATE		PROCEEDINGS	Date Order Judgment N
Aug.1,75	1	Filed petition for writ of habeas corpus.	
Aug.1,75	2	Filed order granting petitioner to proceed in forma pauperis, Carter, J.	
09-19-75	3	Filed affdvt, and order extending respondent's time to file opposition to petitioner's application for writ of habeas corpus to 9/19/75.- Duffy	
10-06-75	4	Filed respondent's (Joan P. Scannell) affdvt. in opposition to petitioner's application for writ of habeas corpus.	
10-28-75	5	Filed petitioner's affdvt. in traverse to respondent's opposition.	
11-03-75	6	Filed notice of assignment to Wyatt, J.	
11-18-75	7	**Filed Memorandum Order. The application is denied, & the Clerk is directed to enter judgment in favoe of the respondent dismissing the application. Etc. Wyatt J. Judgment Entered Clerk 11-19-75. Entered 11-19-75. (mailed notice by Pro Se Clerk)**	
1-28-75	8	Filed Petitioners affidavit in supplementary to the affidavi t in travse.	
1-5-76		Filed petitioner's notice of appeal from dismissal of petition for writ of habeas corpus and denial of certificate of probable cause dtd: 11-18-75. Pro Se Clerk M/N.	

C (

UNITED STATES OF AMERICA ex rel.
RICHARD DAVID, Petitioner,
-v-
J. W. PATTERSON, Superintendent
Eastern Correctional Facility,
Respondent.

75 Civ. 3761
Pro se



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This is an application by Richard David (David), a state prisoner, acting for himself without counsel, for a writ of habeas corpus (28 U.S.C. § 2254). The application was filed on August 1, 1975, after Judge Carter granted a motion to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a). Respondent's "Affidavit in Opposition" was filed on October 6, 1975. Petitioner's "Affidavit in Travse [so in original] to Opposition" was filed on October 28, 1975.

David is in state custody at the New York Eastern Correctional Facility in Napanoch, New York. He is serving an indeterminate term with a minimum of five years and a maximum of fifteen years, a sentence imposed on August 29, 1972, in the New York Supreme Court, New York County (Mr. Justice Leff).

David was arrested on October 20, 1971 and subsequently indicted (Indictment No. 5579/71) for attempted robbery. He was charged with attempting to rob one Jack Schaffer, on October 20,1971, by threatening him with a knife. The trial began on June 23, 1972. The case for the state was that the applicant, with another who eluded capture, attempted to rob Schaffer on a street near the City College of New York (college), that Schaffer managed to run away without surrendering any money or being harmed, that several college security guards pursued the applicant and his companion, and that the guards ultimately apprehended the applicant in an apartment building several blocks from the scene of the crime and took him into custody. The applicant was taken in custody to a security office at the college, questioned for a short time, and then taken to the local precinct police station.

MICROFILM

At the trial, the state introduced the testimony of the college guards, one of whom testified about a certain inculpatory statement which he said that David had made to him. David's attorney, at several points before, during and after the trial, argued that this statement was inadmissible because at the time of the statement David was in custody and had not been given the warnings required by the Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966), (See SM 59-66, 220-25, 337-39; also SM 6-13 (sentence)).

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1.

There are two points made in the application: first, that the college security guards are public or, at the least, quasi-public officials and were therefore required to give David the so-called Miranda warnings prior to questioning him; and, second, that the trial court should have held a hearing to determine whether the statement in question was voluntary.

2.

A preliminary inquiry when a state prisoner applies for a writ of habeas corpus is whether he has shown that he has "exhausted the remedies available in the courts of the State". 28 U.S.C. § 2254

David appealed his conviction of August 29, 1972 to the Appellate Division of the New York Supreme Court (First Department). On March 25, 1974, the Appellate Division, with opinion, remanded the case to the trial court for the purpose of conducting a complete suppression hearing concerning certain statements made by David to a New York City detective (44 A.D.2d 548; 353 N.Y.S.2d 764). The suppression hearing was to be under People v. Huntley, 15 N.Y.2d 72, 255 N.Y.S.2d 838 (1965) and was to be as to the "substance and content" of the statement made to the police detective. The trial court had limited the inquiry to the "constitutionally required warnings". As to these both the trial court and the Appellate Division were satisfied that such warnings had been given. The detective so testified and the Appellate Division found that "the defendant responded that he understood" (353 N.Y.S.2d at 765).

On June 26, 1974, after holding the suppression hearing ordered as to these statements to the detective, the trial court denied the applicant's motion to suppress. The Appellate Division then unanimously affirmed the conviction, without opinion, on September 12, 1974 (359 N.Y.S.2d 766). Subsequently, on November 12, 1974, the Appellate Division granted a motion for reargument and, upon reargument, adhered to its earlier decision affirming the conviction. On November 6, 1974, a judge of the New York Court of Appeals denied David's request for leave to appeal (Stevens, J.).

In his application here, David does not state what claims he made to the Appellate Division and specifically does not state whether he presented a claim that his statement to the security guard was inadmissible. Under 28 U.S.C. § 2254, it is the burden of the applicant to show that he has exhausted state remedies. David has not done this and the application should be dismissed on this ground. In the hope of avoiding further applications in the future, however, the merits will be considered.

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The contention that the guilty verdict cannot stand because of the admission into evidence of David's statement to the college security guard is rejected.

It is doubtful - or at least a close question - whether the college security guards are "police" or "law enforcement officers" within the Miranda decision (384 U.S. at 439, 444). They were apparently employed by the college and do not fit under any definition of "peace officer" or "police officer" in New York Criminal Procedure Law § 1.20(33) and (34).

Assuming, however, that the guard in question was a "police officer" and that Miranda warnings should have been given and were not given, admission of David's statement was not prejudicial to him because "independent evidence" of his "guilt" was "overwhelming". Schneble v. Florida, 405 U.S. 427, 431 (1972) The jury would have reached the same verdict if the guard's testimony on this point had been excluded.

It may also be noted that no claim is here made by David that his statement to the detective was inadmissible; there is persuasive evidence that proper Miranda warnings were given by the detective. The statement of David to the detective, while not the same as that to the guard, was incriminating. The evidence - wholly aside from any statements by David - was overwhelming as to his guilt.

The application is denied, and the Clerk is directed to enter judgment in favor of the respondent dismissing the application. No certificate of probable cause (28 U.S.C. § 2253) will issue because there is no point of any substance to be raised on appeal. In respect of the in forma pauperis statute (28 U.S.C. § 1915(a)), it is certified that an appeal from this order is not taken in good faith. In this context good faith is judged by an objective standard and if an appeal is frivolous it is not taken in good faith. Coppedge v. United States, 369 U.S. 438, 445 (1962); United States v. Visconti, 261 F.2d 215, 218 (2d Cir. 1958), cert. denied, 359 U.S. 954 (1959).

SO ORDERED.

Dated: November 18, 1975

Inzer B. Wyatt

INZER B. WYATT
United States District Judge

JUDGMENT ENTERED-11-19-75

Raymond F. Burghardt
CLERK

QUESTIONS PRESENTED

1. Whether by making reference to facts not in evidence, by personally assuring the jury of the credibility of his own witnesses, and by asserting that defense counsel was not concerned with justice, the district attorney deprived appellant of a fair trial.

2. Whether, because appellant was not given the Miranda warnings when he was questioned by the City College security officers who were public officials engaged in law enforcement, his statement should have been suppressed.

3. Whether appellant was denied his right to a Huntley hearing to determine the voluntariness of statements he allegedly made to police officer Sullivan and to C.C.N.Y. security guard Barcene.

4. Whether the People failed to establish guilt beyond a reasonable doubt.

5. Whether appellant's sentence was excessive and, in the interest of justice, should be reduced.

CERTIFICATE OF SERVICE

May 14, 1976

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

David A. Goffred